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AUG 23 2002

OFFICE OF PETITIONS

In re Application of :
Henry et al :
Application No. 10/017,533 : DECISION DISMISSING
Filed: October 23, 2001 : PETITION FOR FILING DATE
Attorney Docket No. 2001-0099B :
:

This is a decision on the petition filed on April 12, 2002, requesting that the above-identified application be accorded a filing date of October 29, 2001, rather than the presently accorded filing date of October 23, 2001. The petition is treated as a petition under 37 CFR 1.10(d).

The petition is dismissed.

Petitioner requests the earlier filing date on the basis that the application was purportedly deposited with the U.S. Postal Service (USPS), Express Mail Post Office to Addressee on October 29, 2001, pursuant to the requirements of 37 CFR 1.10. In support of the showing that the application is entitled to a filing date of October 29, 2001, petitioner has submitted a copy of an Express Mail Customer Receipt bearing a label number of EL924385509US, the same Express Mail number appearing on the application papers stated to have been mailed via 37 CFR 1.10 on October 29, 2001.

Paragraph (a) of 37 CFR 1.10 states that:

Any correspondence received by the Patent and Trademark Office (Office) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS. The date of deposit with the USPS is shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation. If the USPS deposit date cannot be determined, the

correspondence will be accorded the Office receipt date as the filing date. See §1.6(a)(emphasis supplied).

Paragraph (d) of 37 CFR 1.10 states that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and

(3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS (emphasis supplied).

A grantable petition under 37 CFR 1.10(d) must include "a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in 'Express Mail Post Office to Addressee' service prior to the last scheduled pickup for that day." In addition, the showing "must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the 'Express Mail Post Office to Addressee' service of the USPS." Evidence from the USPS may be, for example, the Express Mail Corporate Account Mailing Statement or a statement by an appropriate official of the USPS that, according to a USPS record, the "date-in" on petitioners' Express Mail receipt is erroneous and accompanied by a copy of the relevant USPS record. Evidence that came into being

within one day after the deposit of the correspondence as Express Mail may be, for example, a log book which contains information such as the Express Mail label number; the application number, attorney docket number or other such file identification number; the place, date and time of deposit; the time of the last scheduled pickup for that date and place of deposit; the depositor's initials or signature; and the date and time of the log book entry.

The petition filed April 12, 2002 is not accompanied by the corroborating evidence required by 37 CFR 1.10(d). In this regard, while the copy of the Express Mail label submitted indicates that the "date-in" appears to be October 23, the only evidence submitted to show a deposit date of October 29, 2001 is the application transmittal letter which is not sufficient evidence. No Express Mail Corporate Account Mailing Statement or a statement by an appropriate official of the USPS that, according to a USPS record, the "date-in" on petitioner's Express Mail receipt is erroneous and accompanied by a copy of the relevant USPS record was. The rule specifically requires that the "date-in" must state the date of actual deposit. Placing the "Date-In" on the Express Mail label by the postal clerk establishes that the package was actually received by the Postal Service. That is the date that verifies that the package was actually mailed. Therefore, the application papers were given the filing date of their receipt in the PTO, i.e., October 23, 2001. Accordingly, the petition must be dismissed.

Any request for reconsideration should be filed within TWO MONTHS of the mail date of this decision in order to be considered timely. See 37 CFR 1.181(f).

Further correspondence with respect to this matter should be addressed as follows:

By mail: Assistant Commissioner for Patents
Box DAC
Washington, D.C. 20231

By FAX: (703) 308-6916
Attn: Office of Petitions

By HAND: Crystal Plaza Four, Suite 3C23
2201 South Clark Place
Arlington, Virginia 22202

Telephone inquiries specific to this decision on petition may be directed to Karen Creasy at (703) 305-8859.

This application is being forwarded to Technology Center AU 2673 for examination
in due course.



Brian Hearn
Senior Petitions Examiner
Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy